IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2018-425-000078
[2019] NZHC 249

BETWEEN	GLADVALE FARMS LIMITED Appellant
AND	ROBERT RAYMOND BATY and KATHLEEN JAMES BATY trading as RR & KJ Baty Partnership Respondents

Hearing: 5 February 2019

Appearances: A D G Hitchcock for the Appellant
A C Ward for the Respondents

Judgment: 25 February 2019

JUDGMENT OF NATION J

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[1] The appellant (Gladvale), appeals a decision of an Arbitrator as to costs.

Background

[2] Gladvale and the respondents (the Batys) were parties to a sharemilking agreement. It began on 1 April 2007 and continued through until 31 May 2009. When the agreement ended, there were a number of issues between the parties. The parties took the dispute to arbitration.

[3] The Arbitrator released a detailed and lengthy decision on 4 December 2013. He later received submissions as to costs and interest and released his decision as to those on 17 December 2014. Gladvale appealed the Arbitrator's decisions as to four issues:

(a) his awarding the Batys a share of Value Add remuneration;

(b) his finding that Gladvale's claim for some $70,000 for claimed losses through Fonterra terminating its contract to take milk from the farm under a winter milking contract had not been proven;

(c) the rate at which interest had been awarded to the Batys; and

(d) his costs award in favour of the Batys.

[4] The Batys' cross-appeal related to one of those issues, namely their entitlement, if any, to Value Add remuneration.

[5] In a judgment of 28 July 2015, I accepted there could be no appeal against the Arbitrator's decision over loss of the winter milking contract because it was a factual determination. I remitted his award for further consideration as to Value Add remuneration, costs and interest.[1]

[6] The Arbitrator had awarded the Batys $62,988.74 including GST of Value Add remuneration which Gladvale had received from Fonterra. The Arbitrator had made this award on the basis of what he held to be an estoppel. The estoppel had never been pleaded.

[7] In their cross-appeal, the Batys contended that, if the award was to be set aside by reason of that pleading failure, then there was an error of law in the way the Arbitrator had interpreted the contract and their potential entitlement to share in the Value Add remuneration.

[8] I held that, by reason of the pleading failure, the Arbitrator's findings as to estoppel had to be set aside. As to the cross-appeal, I held an error had been made in the way the contract had been interpreted.

[9] I held the Batys could be entitled to a share of Value Add remuneration but it was not appropriate for me to make a final determination on that issue because of the

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1 *Gladvale Farms Ltd v Baty* [2015] NZHC 1736.

potential for further evidence to be relevant and because the amount to which they were entitled could require further consideration of all the evidence. Potentially, any defect in the pleadings as to estoppel might also be remedied.

[10] I remitted the award to the Arbitrator and said he would have to consider:[2]

> i. his interpretation of the contract, and the Batys' entitlement to a share of the Value Add payments in light of this Court's opinion as to how the contract could be interpreted;
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> ii. whether to vary his award in favour of the Batys, given estoppel was not pleaded by them (the Arbitrator will have the powers available to the High Court to allow an amendment to the pleadings which may permit him to have regard to estoppel);
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> iii. the award he made for costs, having regard to this Court's opinion in that regard and whatever determination he reaches on Value Add issues; and
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> iv. whether it was appropriate to award interest at 15 per cent and, if not, what that interest rate should be having regard to the opinion of this Court.

[11] As to Value Add, the Arbitrator considered again all the relevant evidence that was before him during the earlier hearing and further evidence. He held the Batys were entitled to a share of Value Add remuneration and for an increased amount. As a result, in his decision of 5 February 2018, the net award to the Batys increased from $32,494.33 to $44,988.77, excluding interest and costs. There is no appeal from that decision.

[12] In a further decision of 8 August 2018, the Arbitrator dealt with interest and costs. He adjusted his previous award of interest to require interest to be paid at the rate of 10 per cent, rather than 15 per cent referred to earlier, but did not require Gladvale to pay interest for 18 months because of the Batys' responsibility for certain delays. There is no appeal from his decision over interest.

The appeal over costs

[13] The Arbitrator originally awarded the Batys $50,000 of their actual solicitors' costs of $76,000, $6,000 of $7,732.50 expert witness fees, $412.97 for witness

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2 At [115].

summons fees and $15,672.58 being one half of the Arbitrator's fees. This meant Gladvale paid all the Arbitrator's fees for the arbitration up to the first appeal to the High Court.

[14] In my judgment, I referred to "an apparent error" in the way the Arbitrator had held Gladvale to be liable for such a high proportion of the Batys' costs and all the Arbitrator's fees when the Arbitrator had said, arguably, Gladvale had overall been more successful than the Batys. I referred to the way the Court of Appeal, in *Packing In Ltd (in liq) v Chilcott*, had said issues over costs should be approached where both parties had been successful.[3] I noted however that, although not referred to by the parties, the appeal over costs was out of time. I also noted that it was accepted by both counsel that, if the Batys could not succeed in recovering for the Value Add part of the claim, Gladvale would ultimately be the successful party.

The Arbitrator's second decision on costs

[15] In submissions to the Arbitrator over costs following his further decision on the Value Add, he was told that the Batys had incurred additional solicitors' costs after the original award but excluding costs for the earlier proceedings in the High Court of an estimated $12,000.

[16] Counsel for the Batys submitted to the Arbitrator that he could not revisit the original award of costs because the appeal over that was time-barred but there could be a reconsideration of the award and additional costs could be awarded as a result of the Arbitrator's review of his decision over Value Add and the fact this had resulted in an increased award for the Batys.

[17] Counsel for Gladvale referred to the comments I had made as to how the award of costs could be affected by an adjudicator's view that both parties had been equally successful. Counsel argued the whole of the original award on costs could be revisited. Counsel ultimately submitted that it was not a case where costs should be awarded and Gladvale should not be required to pay the Arbitrator's entire fee.

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3 *Packing In Ltd (in liq) v Chilcott* (2003) 16 PRNZ 869 (CA).

[18] In his second costs award of 8 August 2018, the Arbitrator did not say he was unable to review the orders he had made previously as to costs although he noted the statement I made in my earlier judgment that the earlier appeal over costs was time-barred.

[19] As to costs, the Arbitrator said:

> 10. Dealing first with the issue of costs, I had previously made an award of $50,000.00 for solicitors costs together with various experts including the arbitrator's fees which yielded a total award of $72,085.55.
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> 11. In the High Court, no appeal had been made against the award of costs and His Honour the Judge noted that, if it had, it would have been time barred, (see para 102 Judgement). His Honour went on to say that if the Claimants could not succeed in recovering for the Value Add part of their claim it would have been Gladvale which would have been ultimately successful in the proceedings. The Judge made prior reference (para 96) to *Packaging In Limited (In Liq) v Chilcock* 20023 16PRNZ869(ca)(5) where the Court of Appeal said that where each party had had similar success it was not helpful to focus too closely on "the question which party has failed and which has succeeded".
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> 12. Judge Justice Nation said that it could be appropriate to vary the award originally made for costs in light of the result of proceedings in the High Court, which can only mean that Claimant should have to be entitled to an additional award of costs.

[20] The Arbitrator referred to the submissions made for the parties and then concluded:

> 16. The net result of these lengthy proceedings is that the Claimant has become entitled to the sum of $44,988.77. It has been an extremely lengthy and expensive exercise for the Claimant to get to that point. There was delay on the part of the Claimant, but I endeavoured to take that into account in my award of costs previously made. I must ignore costs incurred in the High Court proceedings, as those were considered by Justice Nation.
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> 17. Although it could be said that the final award is not substantial, especially given that the original claim was $165,000.00, and in that sense it could be said that the Respondent has a significant measure of success, the contrary view is that, given the proceedings have taken a very lengthy time to come to fruition and the parties have essentially battled the entire distance, there is all the more reason to give the successful party a realistic reimbursement for the costs incurred.
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> 18. Having said that, I do not think it appropriate to approach the matter on a percentage basis but, now that the Claimant has now improved his position as a result of the High Court proceedings, I do not see that some claim for additional costs can be resisted. Taking into account the difficulty and arguability of both sides of the Value Add argument, and also the fact that

> continuity of the case has been such that familiarity with the arguments and counter-arguments must have been well known to counsel, a proportionate award of interest having regard to the increase in the final result for the Claimant is not warranted but in the circumstances I think that an additional award of costs of $5,000.00 is reasonable.

Submissions

[21] In its notice of appeal, Gladvale asked the Court to address a question of law arising out of the award as to whether the arbitral tribunal was correct in making a finding of costs against Gladvale on the basis of and in the amount provided for by his award dated 8 August 2018.

[22] It was not disputed that Gladvale had a right to appeal pursuant to cl 5 of the second schedule to the Arbitration Act 1996. Clause 5 of sch 2 permits either party to appeal to the High Court on a question of law arising out of their award where, as was the case here, the right to appeal on a question of law was part of the arbitration agreement. Pursuant to cl 6(3) of sch 2, the High Court also has a right to vary an arbitrator's award as to how the costs and expenses of the arbitration should be allocated if the High Court is satisfied the amount or allocation of those costs and expenses was unreasonable in all the circumstances.

[23] In detailed submissions for Gladvale, Mr Hitchcock went back to the original arbitration, discussed the original claims and counterclaims, the extent to which the Arbitrator had held the Batys were successful and the basis on which he had made his original award of costs. He referred to my observation that the original award of costs appeared to be inconsistent with his conclusion that Gladvale had arguably been more successful with their counterclaim than the Batys had been with their claim. He cited the way I had referred to the Court of Appeal's judgment in *Packing In Ltd (in liq) v Chilcott* and, with reference to that, my stating:[4]

> … the Court of Appeal held that where each party has had similar success, it is not helpful to focus too closely on the question which party has failed and which has succeeded". Rather, the starting point of costs in such a case should be premised on the fact that "approximately equal success and failure attended the efforts of both sides". Consideration should then be given to the amount

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4 *Gladvale Farms Ltd v Baty*, above n 1, at [96] citing *Packing In Ltd (in liq) v Chilcott*, above n 3, at [5].

> of time spent on each transaction and any other matters relevant to the Court's ultimate discretion.

[24] Mr Hitchcock submitted that, with regard to the original award and on a subsequent award, the Arbitrator had failed to properly apply the *Packing In* principle. He referred to the more recent judgment from the Court of Appeal in *Weaver v Auckland Council*.[5]

[25] Mr Hitchcock then referred to a number of matters which he submitted meant this was not a case where costs should be awarded and Gladvale should not have been required to pay almost the entire fees of the Arbitrator.

[26] In summary, Mr Ward, for the Batys, submitted:

(a) the Court does not have jurisdiction to hear an appeal of the costs orders made in the Arbitrator's award of 17 December 2014, based on principles of time limitation, issue estoppel and abuse of process;

(b) there was no error of law in either award of costs; and

(c) the Arbitrator's allocation of costs and expenses in both decisions was not unreasonable in all the circumstances.

[27] Mr Ward referred to the way the initial appeal against an order for costs was out of time. He argued that the Arbitrator's initial decision had not been quashed. He argued that, as a result, in the first High Court judgment it was left to the Arbitrator to decide if he needed to vary the first award in light of the decision he came to on the question of Value Add. He also argued that the Arbitrator in the second costs award had made a clear decision not to amend his earlier decision.

[28] Mr Ward submitted the attempted second appeal against the first award was an abuse of process in that it was an attempt to continue litigation over an issue where there had been a final judicial decision.

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5 *Weaver & Anderson v Auckland Council* [2017] NZCA 330.

[29] Mr Ward submitted that, under sch 2, cl 6 of the Arbitration Act, the Arbitrator is required to fix and allocate costs in terms of its award so that the discretion as to costs is very wide. He acknowledged sch 2, cl 6(3) provides the High Court with the power to vary a costs award if it finds the Arbitrator has acted unreasonably. As to that, he said the fundamental principle that applies to an award of costs in New Zealand is that the successful party is entitled to a reasonable contribution towards costs.

[30] He submitted the appropriate approach in these circumstances was for the Arbitrator to make a global assessment of who the successful party was rather than making an issue by issue analysis. He drew support for that position from statements made by the Court of Appeal in both *Packing In* and *Weaver*. He argued that, with both costs awards, the Arbitrator had started with the actual costs of the successful party and then reduced the allocation for reasonable costs because of a number of factors. He submitted such an approach was well supported by authority. He pointed out that the actual overall reduction of costs awarded against actual costs incurred was roughly one-third.

Discussion

[31] The first issue I must decide is whether the Arbitrator's original award as to costs of 17 December 2014 can be the subject of this appeal.

[32] On the notice of appeal and by reference to the arbitration decision which was associated with an affidavit filed with the notice of appeal, the appeal was against only the Arbitrator's award of costs dated 8 August 2018. The Arbitrator's original award of costs was not set aside in my judgment of 28 July 2015. Even then, the appeal over that earlier award of costs was out of time, although counsel for both parties had addressed me on the merits of the costs decision when the appeal was heard.

[33] In my earlier judgment, I observed that the Arbitrator's decision for costs seemed to be at odds with his conclusion that, at least on one view of it, Gladvale had been more successful.

[34] I remitted to the Arbitrator his original decision, based on estoppel, that the Batys were entitled to nearly $63,000 for Value Add. It was clear, if ultimately, on a

reconsideration of that issue the Batys were not entitled to a share of the payment for Value Add, then Gladvale would have been the successful party on the original arbitration.

[35] Accordingly, I said in my earlier judgment:

> [103] It was accepted by both counsel that, if the Batys cannot succeed in recovering for the Value Add part of their claim, it will be Gladvale which is ultimately successful. If, on reconsidering how the contract is to be interpreted, the Arbitrator decides to award more than in his original decision, it may also be appropriate to vary the award he originally made for costs.

[36] In my conclusion, I then remitted the award to the Arbitrator and indicated he would have to consider the award he made for costs, having regard to this Court's opinion in that regard and whatever determination he reaches on Value Add issues.

[37] In his second award on costs, the Arbitrator did not proceed as if he was bound to reinstate or repeat the award of costs he had made earlier. He referred to the submissions Mr Hitchcock had made for Gladvale, that it was appropriate to review the awards as to both costs and interest. He referred to various arguments that Mr Hitchcock presented for Gladvale on such a review including Gladvale's assertion that the Batys had been fortunate to avoid liability for Gladvale's claimed damages for loss of winter milk supply, a loss which the Arbitrator had found to be unproven. He said Mr Hitchcock had referred to the error made by the Batys' expert in failing to allow for a $50,000 payment from Gladvale but pointed out that he had taken that into account earlier in reducing the award for the Batys' expert. He referred to Mr Hitchcock's reference to delay on the part of the Batys but said that he had taken that into account in his award of costs made previously.

[38] On the major issue which had been remitted to him, as to whether the Batys were entitled to a share of Value Add, he found in favour of the Batys, the award for them as a result increasing to almost $45,000. That being the case, the Batys remained the party which had ultimately succeeded in the arbitration. With reference to what I had said in my earlier judgment as to the Court of Appeal's statements in *Packing In*, he acknowledged that Gladvale had a significant measure of success.

[39] In providing reasons for his decision, the Arbitrator referred not just to what had happened in the arbitration since his award had been remitted to him by the High Court. He said:

> … given the proceedings have taken a very lengthy time to come to fruition and the parties have essentially battled the entire distance, there is all the more reason to give the successful party a realistic reimbursement for the costs incurred.

[40] In his second decision, the Arbitrator expressly made an award for the Batys additional to what he had provided for in his first decision.

[41] In his submissions for the Batys, Mr Ward submitted that, in his second costs award, the Arbitrator had made a clear decision not to amend his earlier decision.

[42] With the way the Arbitrator had to proceed after matters were remitted back to him by my earlier judgment, I do not accept there had been a final decision on costs for the earlier part of the arbitration as a result of his earlier award and my earlier judgment. This meant the Arbitrator could revisit his first award when reviewing his award of costs in light of his further decision over Value Add. He did so and, in his decision of 8 August 2018, did make a clear decision not to amend his earlier award on costs.

[43] I accordingly proceed on the basis that the Arbitrator's award of 8 August 2018 included a decision, following review of the Batys' Value Add entitlement, that his earlier costs award would stand and the Batys would be entitled to a further $5,000, and payment of half the Arbitrator's further costs.

[44] On this appeal, I am thus required to consider both the lawfulness and reasonableness of both costs awards.

[45] The Arbitrator dealt with the issue of costs in connection with the original arbitration proceedings in a detailed decision of 17 December 2014. In it, he detailed the course of that arbitration which began with an agreement to arbitrate dated 23 August 2011. He recorded counsel's agreement that the pursuit of an arbitration hearing was going to be necessary for the Batys "to make a recovery at all".

[46] He noted there had been delays with the proceedings, most attributable to the Batys. He said significant time was required to resolve all at issue but there was agreement as to the reasonableness of costs incurred by the Batys, then including solicitors' costs of $76,000. He said the degree of success for the Batys in the end was modest, making an award of around only $36,000.

[47] The Arbitrator said that, on one view of it, Gladvale could be said to have been more successful than the Batys and that, when the proceedings were issued, the Batys knew or ought to have known there were many issues which had been left unresolved and in respect of which it might have a liability to Gladvale.

[48] Bearing in mind all those factors, the Arbitrator said he was not prepared to allow a claim for $76,000 as contended for but would allow the sum of $50,000. He added that, if the Batys had been fully successful or close to fully successful, he would have been likely to allow full solicitor/clients costs. He allowed only $6,000 of the $7,732.50 claimed for an expert witness fee because of the mistake that had been made by that witness.

[49] The Arbitrator noted the claim had started as one of $165,000 but, at the commencement of a three day hearing, was reduced to $115,000 when it became apparent the Batys witness had inadvertently failed to notice a payment of $50,000 made by Gladvale. As to that, the Arbitrator said he accepted the submission for the Batys that the expert who had made the error would still have been required to give evidence in the case and that it was possible the same amount of time would have been involved absent the clerical error. He also took the mistake into account in holding the Batys were entitled to only $6,000 of the actual $7,732.50 expert witness costs.

[50] Ultimately, the Batys' claim was for $115,000. The Arbitrator awarded them $56,817.42 on their claims. Gladvale had filed a counterclaim for $185,194.06. He awarded Gladvale $24,323.09 on their counterclaim.

[51] The Batys had been responsible for certain delays in the proceedings. That was one of the factors the Arbitrator took into account in not awarding the Batys' actual solicitor/client costs in his first costs decision. I note also that, in ultimately awarding

interest, the Arbitrator not only adjusted the rate to which the Batys were entitled from the previous 15 per cent to 10 per cent, he also discounted the amount due for interest over eight years, $39,429.82, by $6,748.30, a discount for interest on 18 months for delay.

[52] In his original decision, the Arbitrator said, of all the issues before him on both the claim and counterclaim, the two which occupied most time and attention throughout were Value Add and what could be called penalties for grades.[6] The latter issue related to claims which the Batys made for monies deducted from pay outs to them as the contract milker because of the dairy company grading down the milk due to claimed deficiencies with the Batys' dairy operation. In their statement of claim, the Batys had originally sought $49,766.99 on this basis. In closing submissions, counsel for the Batys conceded the total claim remaining was $30,592.41, exclusive of GST. Gladvale successfully resisted this part of the Batys' claim.

[53] The evidence as to the Batys' claims in this regard must have also been relevant to Gladvale's claim in respect of the loss of the winter milking contract. The amount they had claimed under that head had been $70,228.13. Gladvale failed with that claim. They also failed on a claim for $52,500 plus GST for the loss resulting from 21 cow deaths which Gladvale claimed were a result of mismanagement. In his first costs decision, the Arbitrator said that, following the filing of the statement of defence and counterclaim, there were numerous factual issues which had to be covered off by the Batys.

[54] With the Arbitrator's award confirming the Batys' entitlement to Value Add, it has been confirmed that they were successful with the claims they originally brought to the extent of their entitlement as assessed on the first award of $56,817.42. Gladvale were held entitled to $24,323.09 on their counterclaim. In net terms, the Batys were the successful party to the extent of their being awarded $32,494.33.

[55] In my earlier judgment, I relied significantly on the comments made by the Court of Appeal in *Packing In*.[7] There, Tipping J for the Court of Appeal said:

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6 Arbitrator's first decision, at [10].
7 *Packing In Ltd (in liq) v Chilcott*, above no 3.

> [5] In a case such as the present, where in broad terms each party has had similar success, we do not consider it helpful to focus too closely on the question which party has failed and which has succeeded. Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

[56] In its more recent judgment in *Weaver*, the Court of Appeal have said *Packing In* was understandable in its own context but was not authority for the proposition that, in a damages claim, it should be routine for the Judge dealing with costs to unpick what happened in the detail that occurred in *Packing In*.[8] I read the judgment in *Weaver* as indicating that, in a case where there has been a claim for damages and each party has had some success, the Court will not necessarily have to compare hearing time on all the issues to do justice between the parties.

[57] The Court of Appeal in *Weaver* emphasised the importance of the well settled principle that the party that lost should pay the costs of the party that won. The Court of Appeal also said:[9]

> The Supreme Court in *Shirley v Wairarapa District Health Board*, in referring to what is now r 14.2(a), made clear that the "loser, and only the loser, pays", unless there are exceptional reasons.

[58] In *Weaver*, the trial Judge had held that costs up to a certain point in the proceedings should lie where they fell because each party had approximately equal success. Analysing the result on the plaintiff's particular claim, the Court of Appeal said that the appellant was the successful party, even though only partially successful, so was entitled to costs. They nevertheless said the amount ultimately awarded should be reduced because, although the appellant succeeded, the time and resources necessary for the respondent to meet ultimately unsuccessful argument significantly increased its costs.

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8 *Weaver v Auckland Council*, above n 5, at [24].

9 At [20], citing *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].

[59] The Arbitrator was clearly influenced in his decision by his assessment as to how the litigation had been conducted. He said that, had the Batys not failed with their claim in certain respects and as to certain aspects of the counterclaim, he would have allowed them full solicitor/client costs.

[60] When making his original award on costs, the Arbitrator was referred to a paper presented to the AMINZ-IAMA Conference on 26 July 2013 by Mr Terry Sissons. Mr Sissons referred to various dicta from the High Court which reflected the view that, in arbitrations, "ordinarily a successful party is entitled to a reasonable contribution towards costs unless there are special circumstances making it fair to depart from this principle".[10] Mr Sissons also referred to material which suggested that arbitrators, on that basis, commonly fixed costs at around 75 per cent to 85 per cent of actual costs incurred.

[61] On the basis the Batys had succeeded, to the extent of obtaining a decision for a net amount of $32,494.33, the Arbitrator awarded them approximately 66 per cent of their actual costs. Counsel for Gladvale in the earlier High Court appeal said the costs awarded for the original arbitration were equivalent to the 2B scale in the High Court.

[62] In *Weaver*, the Court of Appeal emphasised the importance of the implications of an appeal over costs being an appeal against the exercise of a discretion. The Court said:

> [19] The starting point is that costs are discretionary.[11] As this Court recently noted, in *Water Guard NZ Ltd v Midgen Enterprises Ltd*:[12]
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> > … an appellate court should not interfere unless, in accordance with settled principles, it is satisfied that in exercising his statutory discretion the Judge acted on a wrong principle, failed to take into account some relevant factor, took into account an irrelevant factor, or was plainly wrong.

[63] I have considered the matters which Mr Hitchcock, for Gladvale, put before me in submitting that the Arbitrator's original award of costs should effectively be

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10 *Rosser v Global Construction Services Ltd* HC Auckland CIV-2004-404-2564, 10 August 2004 at [29], citing *Marx v Attorney-General* [1974] 2 NZLR 372.

11 High Court Rules, r 14.1.

12 *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [11] (footnotes omitted).

overturned. With confirmation that the Batys were entitled to succeed on their Value Add claim, I have not been persuaded that there was any error in the Arbitrator's award of $50,000 costs in his original award, confirmed with his second award.

[64] Consistent with the approach the Court of Appeal in *Weaver* said was appropriate, the Arbitrator appears to have decided what costs the Batys could have been entitled to as the successful party but to have then reduced that amount, having regard to the expense to which Gladvale had been put on issues where the Batys were not successful.

[65] Neither on the earlier appeal nor on this appeal did counsel for either party suggest that there had been an error in the Arbitrator failing to assess costs in a way that would have been consistent with r 14.16 of the High Court Rules. The costs were being fixed in the context of an arbitration so the rules did not directly apply but they would often be usefully referred to in determining what would be a just award of costs. Rule 14.16 states:

> **14.16 Claim and counterclaim both established**
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> The court must award costs as if each party had succeeded in an independent proceeding, unless, in the court's opinion, the justice of the case otherwise requires, if—
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> (a) the plaintiff succeeds in his or her proceeding; and
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> (b) the defendant succeeds in a counterclaim.

[66] Reference to that rule does not cause me to change my assessment as to the justice of the ultimate determination made by the Arbitrator except in one respect. Gladvale had some success on its counterclaim but, in major respects, they failed. It is apparent from the Arbitrator's decision on the issues where they failed that the Batys would have been put to considerable trouble and expense in responding to those claims.

[67] The fact Gladvale succeeded to a certain extent on their counterclaim has however led me to find there was an error as to one aspect of the Arbitrator's earlier award. The Arbitrator required Gladvale to pay the Batys $15,672.58 for a half share

of the Arbitrator's costs. With that direction, Gladvale had to pay the total arbitration costs up to that point.

[68] It is clear from the Arbitrator's decision that, on the termination of the sharemilking agreement, there were many issues between the parties on which there was very little, if any, willingness to compromise. This meant that both parties were committed to having the issues determined by arbitration. Both the Batys and Gladvale had a measure of success. That being the case, I find there was an error in the Arbitrator requiring Gladvale to meet all the Arbitrator's costs in respect of his initial award.

[69] I turn now to the appeal against the further award of costs for the continuing arbitration in respect of the matters on which the original award was remitted back to the Arbitrator.

[70] On the issue as to the Batys' entitlement to Value Add, the Batys were successful. Not only were they entitled to the amount originally awarded, their entitlement increased by approximately $12,500. In this part of the arbitration, they incurred further costs of $12,000. There was no suggestion those actual costs were unreasonable.

[71] The only criticism I would make of the Arbitrator's decision over costs for this part of the arbitration was his comment that I had said in my judgment that:

> … it could be appropriate to vary the award originally made for costs in light of the result of proceedings in the High Court, which can only mean that [the Batys] should have to be entitled to an additional award of costs.

[72] In my judgment I had said:[13]

> If, on reconsidering how the contract is to be interpreted, the Arbitrator decides to award more than in his original decision, it may also be appropriate to vary the award he originally made for costs.

There, I was acknowledging he would still have a discretion.

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13 *Gladvale Farms Ltd v Baty*, above n 1, at [103].

[73] In the end, however, this is how he approached it. He referred to the submissions made for Gladvale that there should be no order as to costs. For the reasons given, he rejected that submission. He also rejected the submission made for the Batys that, because his ultimate award on Value Add increased the amount they were entitled to by 25 per cent, the amount of his original award of costs should be increased by such an amount. Instead, he had regard to the actual costs incurred which he was told were about $12,000. He awarded only a proportion of that. I have not been persuaded that the decision he reached should be set aside or varied.

[74] With the Batys having been the only successful party as to the Value Add claim in respect of which further costs were incurred and sought, it cannot be said there was any error in the Arbitrator exercising his discretion to require Gladvale to pay to the Batys $1,184.62 for a half share of the Arbitrator's fees on that further award.

[75] A major factor in the decision the Arbitrator came to not to vary his original award of costs and to award further costs was his assessment of how the litigation had been conducted, all the issues that the parties and the Arbitrator had to deal with and the ultimate outcome of all those issues. The awarding of costs is ultimately a matter of discretion as to what is just. The Arbitrator was best placed to determine how this litigation, by way of arbitration, had been conducted and what was just with due regard to established principles. The decisions he came to are entitled to respect. I have not been persuaded that it would be appropriate to vary the determinations he came to except to the limited extent already referred to.

Conclusion

[76] As to the Arbitrator's initial award of costs, as confirmed by his award of 8 August 2018, I set aside his direction that Gladvale pay the Batys $15,672.58, being half the arbitration costs. I confirm his award that Gladvale pay the Batys $50,000 in costs, expert witness fees of $6,000 and $412.97 for witness summons fees.

[77] I confirm the Arbitrator's award that Gladvale pay the Batys additional costs of $5,000 and $1,184.62 being a half share of the Arbitrator's further fees.

[78] Although Gladvale has succeeded with regard to the Arbitrator's decision requiring Gladvale to pay the Batys $15,672.58 of the Arbitrator's initial costs, given the breadth of Gladvale's challenges to the Arbitrator's awards of costs, it is the Batys who have been the successful party on the hearing of this appeal. They are entitled to costs on a 2B basis.

[79] If there is any dispute over what those costs should be, a memorandum for the Batys is to be filed within four weeks. Gladvale is to file their memorandum in reply within two weeks of the filing of the Batys' memorandum. Any memorandum in reply from the Batys must be filed within 14 days of their receiving Gladvale's memorandum. The memoranda are to be no longer than four pages. If necessary, costs will be determined on the papers.

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